

IN THE  
**ARIZONA COURT OF APPEALS**  
DIVISION TWO

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IN RE THE MARRIAGE OF

ANDREY KIRK YEATTS,  
*Petitioner/Appellant,*

*and*

TERESA MARIE YEATTS,  
*Respondent/Appellee.*

No. 2 CA-CV 2013-0161  
Filed July 25, 2014

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THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND  
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
NOT FOR PUBLICATION  
*See* Ariz. R. Sup. Ct. 111(c); Ariz. R. Civ. App. P. 28(c).

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Appeal from the Superior Court in Pima County  
No. D20122055  
The Honorable John J. Assini, Judge Pro Tempore

**DISMISSED**

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COUNSEL

Solyn & Lieberman, PLLC, Tucson  
By Scott Lieberman and Melissa Solyn  
*Counsel for Petitioner/Appellant*

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Waterfall, Economidis, Caldwell, Hanshaw

& Villamana, P.C., Tucson

By Corey B. Larson

*Counsel for Respondent/Appellee*

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**MEMORANDUM DECISION**

Judge Espinosa authored the decision of the Court, in which Presiding Judge Miller and Chief Judge Eckerstrom concurred.

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ESPINOSA, Judge:

¶1 Andrey Yeatts appeals the denial of his motion to set aside a settlement agreement and a subsequent decree of legal separation incorporating that agreement. Because we conclude these related orders constituted an arbitration award, this matter must be dismissed for lack of jurisdiction.

**Factual and Procedural Background**

¶2 Andrey filed a petition for legal separation from his wife, Teresa Yeatts, in May 2012. Before trial, the parties stipulated to continue their required mandatory domestic settlement conference, *see* Pima Cnty. Super. Ct. Loc. R. P. 8.4, and conduct a private settlement conference<sup>1</sup> with attorney John Assini. The court's order to this effect also provided that Assini would serve as "Settlement Judge Pro Tem" upon completion of the conference. Assini thereafter entered an order indicating the parties had reached "full agreement regarding their Decree of Legal Separation" and describing in detail the terms of their settlement. The order contained the following clause: "The parties further agree that this Judge Pro Tem shall arbitrate any issues regarding any language in

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<sup>1</sup>Although the parties refer to this proceeding, at times, as a "mediation," the stipulation and court order both identify it as a "private settlement conference."

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said Decree, or any other issues that arise regarding this Decree of Legal Separation.”

¶3 Several months later, Teresa lodged a proposed decree of legal separation with the court. Andrey responded with an “Objection and Response to [Teresa’s] Notice of Lodging and Petitioner’s Motion to Set Aside the Alleged Settlement in Full,” in which he argued he “did not knowingly or voluntarily consent” to the “patently unfair and inequitable” settlement agreement already entered into the record. Assini then entered a “Ruling” denying Andrey’s motion to set aside the settlement agreement and stating his intention to sign the proposed decree. Andrey filed a notice of appeal from Assini’s ruling and the decree of dissolution, which Assini had signed and entered into the record. After Andrey filed an opening brief, Teresa submitted an answering brief arguing, *inter alia*, that the arbitration clause in the parties’ settlement agreement operated to preclude or limit the scope of this court’s appellate review. At our request, the parties submitted supplemental briefing to address our related concern regarding our jurisdiction.

**Discussion**

¶4 Pursuant to § 12-2101.01, A.R.S., we have jurisdiction to hear an appeal from “[a]n order denying confirmation of an [arbitration] award,” “modifying or correcting an award,” or “vacating an award without directing a rehearing.” § 12-2101.01(A)(3), (4), (5). We also may review a “judgment or decree” entered pursuant to the Uniform Arbitration Act or the Revised Uniform Arbitration Act.<sup>2</sup> § 12-2101.01(A)(6). We are not,

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<sup>2</sup>Arizona has two arbitration statutes: the Uniform Arbitration Act (U.A.A.), A.R.S. §§ 12-1501 through 12-1518, and the Revised Uniform Arbitration Act (R.U.A.A.), A.R.S. §§ 12-3001 through 12-3029, which applies to this proceeding and most others commenced after January 1, 2011, *see Sun Valley Ranch 308 Ltd. P’ship ex rel. Englewood Props., Inc. v. Robson*, 231 Ariz. 287, ¶ 8, 294 P.3d 125, 129 (App. 2012). Because the R.U.A.A. excludes four categories of dispute covered under the U.A.A., the latter statute was not repealed upon passage of the R.U.A.A. *See* § 12-3003; Bruce E.

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however, afforded jurisdiction to review arbitration awards directly. See § 12-2101.01. This limitation on our jurisdiction was recently addressed in *Chang v. Siu*, a case involving an arbitration award in a dissolution proceeding. 234 Ariz. 442, ¶ 13, 323 P.3d 725, 729 (App. 2014). There, the parties' arbitration agreement contained a clause "preserving [their] right to appeal a final Arbitration Award to the Arizona Court of Appeals," and stipulating that "appeals shall not be taken to the Superior Court of Arizona." *Id.* ¶ 3. In reaching the merits of the appeal, this court was careful to note that its jurisdiction arose "not from the parties' agreement but from the superior court's final order and judgment granting Wife's motion to confirm the award." *Id.* ¶ 13. Absent prior review by the superior court, we lacked the ability to consider a party's challenge to an arbitration award because the parties could not, by agreement, "create appellate jurisdiction where it otherwise would not exist." *Id.* Thus, if the September 2013 ruling on Andrey's motion and accompanying decree of legal separation were the result of an arbitration conducted pursuant to the parties' settlement agreement, we lack jurisdiction to hear this appeal.

¶5 Andrey contends the ruling is a judgment that was entered in Assini's capacity as "Judge Pro Tempore of the Arizona Superior Court." But the limitations imposed by the trial court's order appointing Assini demonstrate that, when the challenged ruling and separation decree were entered, he was acting not as a judge pro tempore but as an arbitrator. Pursuant to that order of appointment, Assini was to "conduct a private settlement conference with the parties and counsel . . . on January 22" and thereafter "serve as Settlement Judge Pro Tem for purposes of the mandatory domestic settlement conference." Such conferences are governed by Rule 67(D),<sup>3</sup> which provides that a "judge, commissioner, or judge

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Meyerson, *Arizona Adopts the Revised Uniform Arbitration Act*, 43 Ariz. St. L.J. 481, 486 (2011).

<sup>3</sup>Although settlement conferences are also addressed in Rule 8.4, Pima Cnty. Super. Ct. Loc. R. P. ("Mandatory Domestic Settlement Conference"), that rule does not provide for the appointment of a settlement judge pro tempore imbued with

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pro tempore conducting the settlement conference shall make any findings necessary to approve the agreement pursuant to A.R.S. § 25-317 and may sign any Decree of Dissolution presented that conforms to the agreements reached by the parties.” Ariz. R. Fam. Law P. 67(D)(5).

¶6 Rule 67 does not authorize the settlement judge to enter findings of fact or law on contested issues; on the contrary, it provides that, in the event a full agreement is not reached, the settlement judge “shall file a brief report with the court stating . . . any agreements reached and the issues remaining for resolution.” Ariz. R. Fam. Law P. 67(D)(7). Thus, while Assini’s status as a judge pro tempore afforded him “all the judicial powers of a regular elected judge,” Ariz. Const. art. VI, § 31(B), his role as settlement judge was confined by the plain language of Rule 67(D). *Cf. Green v. Thompson*, 17 Ariz. App. 587, 590, 499 P.2d 715, 718 (1972) (court commissioner’s powers stem from constitution and supreme court rules); *see also Stout v. Taylor*, 233 Ariz. 275, ¶ 11, 311 P.3d 1088, 1091 (App. 2013) (courts give effect to plain meaning of rule where language is unambiguous). While free to enter any order documenting an agreement between the parties, Assini lacked authority as a judge pro tempore to issue a determination on Andrey’s challenge to the proposed decree. *See* Ariz. R. Fam. Law P.

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authority to make findings pursuant to A.R.S. § 25-317. Thus, notwithstanding the use of the term “mandatory domestic settlement conference,” in the proposed order signed by the court, it is clear the parties participated in a settlement conference pursuant to Rule 67. *Compare* Ariz. R. Fam. Law P. 67(D)(5) (“judge pro tempore conducting the settlement conference shall make any findings necessary to approve the agreement pursuant to A.R.S. § 25-317 and may sign any Decree of Dissolution presented that conforms to the agreements reached by the parties”), *with* *Pima Cnty. Super. Ct. R. P. 8.4(C)* (parties “may stipulate that agreements . . . shall be binding upon the parties, subject to the approval of the Court”); *see also Pima Cnty. Super. Ct. R. P. 8.4(A)* (“mandatory domestic settlement conference shall not be a proceeding subject to Rule 67, Arizona Rules of Family Law Procedure”).

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67(D). His ruling on Andrey's motion to set aside and objection to the proposed decree were, instead, an exercise of the powers afforded to him as an arbitrator pursuant to the parties' settlement agreement.<sup>4</sup> We therefore conclude that the September 2013 ruling resolving Andrey's challenge to the settlement agreement and accompanying "decree" constitute an arbitration award that must first be challenged in the superior court pursuant to A.R.S. § 12-3023 or A.R.S. § 12-3024.<sup>5</sup> See § 12-2101.01.

¶7 In her supplemental brief, Teresa urges us to "affirm the judgment of the trial court in all respects" based on Andrey's failure to file a motion to vacate an arbitration award "within ninety days after the movant receives notice of the award." § 12-3023(B). Without jurisdiction, however, we are unable to render such relief. And even were we possessed of jurisdiction, we would be disinclined to dismiss the appeal on such grounds. While we acknowledge that any ambiguity in the award was a direct result of the parties' agreement to have Assini act as both settlement conference judge and arbitrator, we also recognize that it provides at least an arguable basis for Andrey to claim he lacked notice of the award until our determination herein.

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<sup>4</sup>The confusion surrounding Assini's dual roles in this case was only exacerbated by the language of the arbitration clause quoted above, which designated "this Judge Pro Tempore" as arbitrator. Notwithstanding the conflation of these two roles in the settlement agreement, the duties ascribed to each remain distinct, and our decision confirms that while Assini was acting as judge pro tempore when he signed the settlement agreement, all subsequent documents were signed by him as arbitrator.

<sup>5</sup>Although Andrey raises several arguments in his supplemental brief concerning the scope of the arbitration clause, the lack of notice under A.R.S. § 12-3009, and waiver, these issues go to the merits of his challenge to the award. See § 12-3023.

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¶8 Both parties seek their costs and attorney fees on appeal pursuant to A.R.S. § 25-324.<sup>6</sup> Teresa also requests such an award under A.R.S. §§ 12-341.01 and 12-3025. Neither side has addressed our ability to award attorney fees in a case in which we lack subject matter jurisdiction. In any event, the grounds cited do not warrant such an award to either one. Section 25-324 requires consideration of the “financial resources of both parties and the reasonableness of the positions each party has taken throughout the proceedings” in determining whether to award attorney fees. The prospect of further proceedings in the superior court that may impact the parties’ financial resources prompts a denial of their motions at this juncture. *See Duckstein v. Wolf*, 230 Ariz. 227, ¶ 27, 282 P.3d 428, 436 (App. 2012) (attorney fees award premature in light of remand to superior court). Teresa’s motion for fees pursuant to §§ 12-341.01 and 12-3025 is similarly unavailing, as both statutes involve fee awards for prevailing parties, and neither party was entirely successful on appeal. *See* §§ 12-341.01, 12-3025.

### Disposition

¶9 For the foregoing reasons, this appeal is dismissed.

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<sup>6</sup>Teresa also invokes Rule 69(B), Ariz. R. Fam. Law P. However, that provision simply incorporates § 25-324. *See* Ariz. R. Fam. Law P. 69(B) (“Pursuant to A.R.S. § 25-324, the court may award a party the cost and expenses of maintaining or defending a proceeding to challenge the validity of an agreement made in accordance with this rule.”).